Buffalo Law Review

Volume 21 | Number 2 Article 13

1-1-1972

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William M. Feigenbaum

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Recommended Citation
William M. Feigenbaum, *Legislation—The Delaware Coastal Zone Act*, 21 Buff. L. Rev. 481 (1972).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol21/iss2/13

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LEGISLATIVE NOTE

LEGISLATION—THE DELAWARE COASTAL ZONE ACT

I. INTRODUCTION

"It is hereby determined that the coastal areas of Delaware are the most critical areas for the future of the State. . . . It is, therefore, the declared public policy of the State of Delaware to control the location, extent and type of industrial development in Delaware's coastal areas."[1] Thus begins the recently enacted Coastal Zone Act of Delaware.[2] The present note will discuss this landmark contribution to ecological legislation and compare it with statutes controlling coastal or wetlands areas in other jurisdictions of the United States. In addition, the legal validity of this law will be examined both with respect to possible conflicts with the commerce clause and the due process clause of the fourteenth amendment.

II. THE DELAWARE COASTAL ZONE ACT

A. *Purpose and General Provisions*

It has become increasingly obvious that the balance of nature is being seriously threatened throughout this country. As a result, pressure is being applied to the various legislative bodies to enact laws to protect the environment from further encroachment in the name of "progress." Within the past few years several jurisdictions have passed statutes which make some attempt to achieve this laudable result.[3] This has been particularly observed with respect to the coastal areas of the nation, which have been recognized as being especially vulnerable.[4] In response to this need, the General Assembly of Delaware has enacted what is, as of this writing, the most comprehensive legislation concerning the regulation of industrial development in a coastal area.

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1. Coastal Zone Act, DEL. CODE ANN. tit. 7, § 7001 (1971).

2. The term "coastal zone" cannot be exactly described per se. Legally, Delaware defines it as that portion of its land extending the length of its coast, with a width that commences at its territorial limits in Delaware Bay, and roughly extends a few miles inland. *Id.* § 7002 (a).

3. *See* Part III, *infra.*

4. *See generally* Ludwigson, *Managing the Environment in the Coastal Zone,* 1 BNA ENVIR. RPTR. MONOGRAPH No. 3 (1970).

The Delaware Coastal Zone Act[5] (CZA) was passed in order for that state to "protect the natural environment of its bay and coastal areas and safeguard their use primarily for recreation and tourism."[6] In order to achieve this result, the CZA expressly prohibits the further introduction into the coastal zone of "heavy industry," including but not limited to oil refineries, basic steel manufacturing plants, cellulosic paper mills, and petrochemical complexes.[7] In addition, because they represent a potential danger of pollution "and generate pressure for the construction of industrial plants in the Coastal Zone," the construction of additional off-shore bulk transfer facilities is also proscribed.[8] Specific uses *not* included in the Act's heavy industry ban are garment factories, automobile assembly plants, and jewelry and leather goods manufacturing establishments.[9] These uses are not considered to be significant sources of pollution. Sewage treatment and recycling plants are also exempt from the ban.[10] In order to balance environmental protection with the need for future industrial growth, and to obtain new state and local tax revenues, manufacturing uses other than heavy industry will be allowed in the Coastal Zone by permit.[11] All nonmanufacturing uses are unaffected by the statute.

The CZA provides that requests for a new manufacturing use or expansion of an existing nonconforming use in the Coastal Zone shall be sent to the State Planner. Such applications must include site plans, a description of the proposed use, proof of approval of the activity by the proper county or local municipal zoning authorities, and an "Environmental Impact Statement."[12] This "Statement" must evaluate the "effect of the proposed use on the immediate and surrounding environment and natural resources such as water quality, fisheries, wildlife and the aesthetics of the region."[13] The State Planner must then hold a public hearing on

5. Coastal Zone Act, DEL. CODE ANN. tit. 7, §§ 7001-14 (1971) [hereinafter referred to as the CZA or the Act].

6. *Id.* § 7001.

7. *Id.* §§ 7002 (e), 7003. Non-conforming uses of such activities already in existence are not affected. *Id.* § 7004 (a).

8. *Id.* § 7001.

9. *Id.* § 7002 (e).

10. *Id.* § 7003.

11. *Id.* § 7004 (a).

12. *Id.* § 7005 (a).

13. *Id.* § 7002 (c).

the proposed permit,[14] and if he finds that the request is for a type of use allowable by permit under the CZA, he must consider the particular request in light of certain specific factors. These include: (1) the new use's impact on the *environment,* which includes consideration of the "probable air and water pollution likely to generated . . . under normal operating conditions as well as during mechanical malfunction," the killing of area plant and animal life, drainage and flood control, and production of obnoxious odors; (2) the *economic effects,* such as jobs and income generated, and potential tax revenues created in regard to the amount of land that will be needed for the activity; (3) *aesthetic effects* on the scenic quality of the local area; (4) effects on *neighboring land uses,* such as public means of access to coastal waters, effects on recreational facilities and surrounding agricultural and residential communities; and (5) effects on *local plans* in terms of the development or conservation of the local areas.[15]

B. *Appeals and Litigation*

The CZA establishes a ten member State Coastal Zone Industrial Control Board which is empowered to hear appeals from "[a]ny person *aggrieved* by a final decision of the State Planner . . . ."[16] After a public hearing, at which the petitioner may bring his lawyer, the Board may modify or reverse the Planner's ruling. Similarly, the State Planner or "any aggrieved person" can appeal an adverse decision of the Board to the superior court of the affected county.[17] Appeals to the court must "be based on the record of proceedings before the Board, the only issue being whether the Board abused its discretion . . . ."[18]

Interestingly, the CZA defines "person" as including individuals, groups, corporations, administrative agencies, or other

14. *Id.* § 7005 (a).
15. *Id.* § 7004 (b).
16. *Id.* § 7007 (b) (emphasis added). [The Delaware Coastal Zone Industrial Control Board will hereinafter be referred to as "the Board."]
17. *Id.* § 7008. The phrase "aggrieved person" is a term of art involving the subject of standing to sue. The latter is in itself a complicated issue and is generally beyond the scope of this paper. For a recent discussion of this topic by the Supreme Court agreeing that an injury to aesthetic and conservational, as well as economic interests, may be sufficient to confer standing, see Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970).
18. CZA § 7008.

legal entities.[19] This broad definition presumably does not imply that *anyone* in this category, for example conservation groups, can appeal to the court as a matter of right if they simply do not like a decision of the State Planner granting a use permit.[20] As stated above, such appellants must still be "aggrieved."[21] Nevertheless, if this requirement can be met, there are no additional legal obstacles to obtaining judicial review. The superior court may, of course, reverse or modify an order of the Board.[22] If the court rules that a denial of, or restrictions upon, a permit constitute a taking without compensation in violation of due process of law, a fee simple or lesser title in the land may be acquired by the state through a negotiated sale or via eminent domain.[23] However, if this option is not exercised by the state within five years, the use permit must be granted.[24]

In case of a violation of any provision of the CZA, the Attorney General of Delaware may issue a cease and desist order. However, this order can only last thirty days, unless the violator is also enjoined by the court.[25] Penalties for violation of the Act

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19. *Id.* § 7002(g).

20. *Cf.* Kerpelman v. Board of Pub. Works of Maryland, 261 Md. 436, 276 A.2d 56 (1971) (denying standing to a private individual).

21. CZA § 7008. Under this provision even an *applicant* who is denied a use permit must still show aggrievement. Conceivably, he may even have to litigate this issue. *Cf.* CONN. GEN. STAT. ANN. § 22-7n(a) (Supp. 1971), allowing appeal by an applicant denied a permit for a regulated activity in a wetlands area as of right. Nevertheless, the necessity for such an applicant's aggrievement in order to sue is currently a major issue discussed in Second Supplemental Brief in Support of Motion to Expunge Plea in Abatement, Ryker Indus. Corp. v. Gill, Civil No. 170229, (Super. Ct., Hartford County, filed Oct. 28, 1971). In *Ryker,* conservation groups allege that plaintiff, who claims damages of $78,000,000, is not aggrieved within the meaning of the statute because the land in question is below mean high tide, and thus, in fact, held by the state in trust for the people. The implications of tidal title and the relationship of subaqueous land ownership and littoral rights means that in Connecticut only in those cases where the land is above high water mark will an applicant denied a use permit clearly be aggrieved. Delaware, however, grants title to the low water mark. *See* State *ex rel.* Buckson v. Pennsylvania R.R., — Del. —, 267 A.2d 455 (1969).

22. CZA § 7008.

23. *Id.* § 7009. The CZA makes no distinction between the littoral rights of private shoreline owners and state-owned coastal land. Of course, "takings" by the state of private littoral rights of landowners must be compensated. *See generally* R. REIS, CONNECTICUT WATER LAW: JUDICIAL ALLOCATION OF WATER RESOURCES (1967).

24. CZA § 7009. This provision, allowing the state to delay five years before deciding to grant the applicant his permit or to condemn the land, may be invalid. *Cf.* Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951), where an ordinance allowing private property to be similarly "frozen" for three years was declared unconstitutional as a taking without just compensation; *accord,* Keystone Associates v. Moerdler, 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966) (six months).

25. CZA § 7010.

can be up to fifty thousand dollars per offense, with continuing activities considered as a *separate violation* for each day.[26]

III. Coastal Zone Regulation in Other Jurisdictions

The essential importance of the CZA is that it goes considerably further towards regulating development in a shoreline area than any other legislation to date. No other state has enacted anything similar to Delaware's flat ban on heavy industry from its coast. Several states, however, have passed "dredge and fill," or wetlands statutes, which generally require a permit from a state conservation or natural resources agency before such activities can be commenced on a wetland.[27] As an example, Maryland has stated in the preamble to its wetlands legislation that it is the "public policy of this State, taking into account varying ecological, economic, developmental, recreational and aesthetic values, to preserve the wetlands and to prevent the despoliation and destruction thereof."[28] Thus, anyone desiring to dredge or fill *state* owned wetlands must first obtain a license from the Board of Public Works. Before such a license may be issued, the Maryland Secretary of Natural Resources must approve the project after consulting with appropriate federal, state and local agencies.[29] If the Secretary approves the project, the Board must nevertheless hold hearings to determine whether the activity is "in the best interests of the State" before it may finally grant the license.[30] Violators of this provision may be fined one thousand dollars and become liable for the restoration of the area to its prior state.[31] It is significant to note that these provisions apply only to *state* wetlands; *privately* owned wetlands are only under such regulations concerning dredging and filling as the Secretary of Natural Resources *may issue,* subject to approval by the Agricultural Commission.[32] Penalties for viola-

26. *Id.* § 7011.

27. The definition of the term "wetland" varies from state to state, but it generally refers to a swamp, marsh, bog, etc. *See, e.g.,* Conn. Gen. Stat. Ann. § 22-7i(2) (Supp. 1971).

28. Md. Ann. Code art. 66c, § 718 (1970). The Maryland legislation is reviewed in Comment, *Maryland's Wetlands: The Legal Quagmire,* 30 Md. L. Rev. 240 (1970).

29. *See* Md. Ann. Code art. 66C, § 721 (1970). This wetlands statute is discussed in State Bd. of Pub. Works v. Larmar Corp., 262 Md. 24, 277 A.2d 427 (1971).

30. Md. Ann. Code art. 66C, § 721 (1970).

31. *Id.*

32. *Id.* § 722.

tions on privately owned wetlands range up to one hundred dollars and/or one month's imprisonment.[33] These regulations are thus clearly less restrictive than those of the CZA, which regulates the entire coastal zone and allows substantial fines for violations.

A more effective wetlands statute is that of Connecticut, in which it is stated that "much of the wetlands of the state have been lost or despoiled by unregulated dredging, dumping, filling and like activities and that the remaining wetlands of this state are all in jeopardy of being lost or despoiled . . . ."[34] Anyone engaged in this type of activity on *any* wetland must apply for a permit from the Commissioner of Agriculture and Natural Resources. The petitioner must furnish in his application a comprehensive description of his proposed use.[35] The Commissioner must notify various local and state authorities, hold a public hearing, consider the effect of the activity on the public health and welfare, and inquire into the effects on marine and wildlife.[36] Penalties for a *knowing* violation of the statute include the cost of restoration of the area and up to one thousand dollars a day in fines.[37] It should be observed that while such legislation merely purports to regulate dredging, filling, excavation, and the like in wetlands areas, these prohibitions may, in fact, provide broader protection for the environment than the CZA. In these wetlands, no commercial development is feasible without prior dredge and fill or similar work. Thus, requiring a permit to dredge and fill, in reality, necessitates approval of any proposed development. The CZA, on the other hand, only regulates or prohibits *certain* uses. Consequently, the main shortcoming of a comprehensive wetlands statue, vis-à-vis the Delaware Act, is that such legislation is limited to the regulation of wetlands rather than affecting the entire coast.

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33. *Id.* § 730. For a knowing violation of such dredge and fill regulations the maximum monetary penalty is one hundred dollars plus the cost of restoration. Compare this with Delaware's statutory maximum of fifty thousand dollars per day. CZA § 7011.

34. CONN. GEN. STAT. ANN. § 22-7h (Supp. 1971).

35. *Id.* § 22-*l*.

36. *Id.* § 22-7m provides that if, on appeal to the superior court, the commissioner's denial of a use permit is found to be a taking without compensation, the commissioner may elect to issue the permit or allow damages to applicant in an eminent domain proceeding. This is similar to the Delaware provisions (see text at *supra* notes 23-24), but without their possibility of a five year delay.

37. CONN. GEN. STAT. ANN. §§ 22-7*l*, *m* & *o* (Supp. 1971). Note the requirement of a "knowing" violation. Presumably a merely negligent offender is safe. The CZA penalizes violations per se—knowledge is unnecessary.

Other jurisdictions regulating wetlands include Georgia,[38] Maine,[39] Massachusetts,[40] Vermont,[41] and Rhode Island.[42] The extent of the regulation varies considerably from state to state. In Rhode Island, coastal wetlands may be designated as areas whose ecology may not be tampered with. However, while violators of such a regulation may be enjoined, no express penalties are provided. Further, any landowner who suffers damage because of any wetlands use regulation may specifically apply to the state for damages.[43] The latter is a very disturbing provision, which could be disastrous in a larger state in terms of meaningful control of wetlands areas. If all such owners have to be compensated, the cost of regulation will be prohibitive. Of course, such a policy eliminates the possibility of an unconstitutional taking in violation of due process. Vermont has a vague, generalized wetlands statute that provides for a maximum fine of one hundred dollars and/or up to 30 days imprisonment per violation.[44] Thus, the Delaware Act, with its absolute ban on certain industry in the entire coastal zone, its detailed provisions, and its steep penalties, goes well beyond any other state plan to date.

There is as yet no federal law dealing expressly with the control of activities in coastal areas for ecological purposes.[45] The Rivers and Harbors Act provides that "it shall not be lawful to excavate or fill . . . the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army

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38. GA. CODE ANN. §§ 45-136 to 45-147 (Supp. 1970), discussed in Note, *Regulation and Ownership of the Marshlands: The Georgia Marshlands Act,* 5 GA. L. REV. 563 (1971).

39. ME. REV. STAT. ANN. tit. 12, §§ 4701-09 (Supp. 1970).

40. MASS. GEN. LAWS ANN. ch. 130, §§ 22-27 (Supp. 1971).

41. VT. STAT. ANN. tit. 10, §§ 1100-05 (Supp. 1971).

42. R.I. GEN. LAWS ANN. §§ 2-1-13 to 2-1-17 (Supp. 1970). This list is by no means exhaustive. For an excellent comparative analysis of New England wetlands legislation, see R. BRENNEMAN, PUBLIC REGULATION OF COASTAL WETLANDS IN CONNECTICUT, REPORT TO SAVE THE WETLANDS COMMITTEE, INC. (1968).

43. R.I. GEN. LAWS ANN. § 2-1-16 (Supp. 1970); *cf.* Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas,* 110 U. PA. L. REV. 179-239 (1961).

44. VT. STAT. ANN. tit. 10, §§ 1100-05 (Supp. 1971). Vermont does not border the Atlantic Ocean. Thus, this legislation deals only with inland wetlands.

45. It is generally agreed that the *states* must be primarily responsible for their coastal areas. For a recent discussion of proposed federal action in this area, which will most likely take the form of monetary aid and support to the states, see Knight, *Proposed Systems of Coastal Zones Management: An Interim Analysis,* 3 NATURAL RESOURCES LAW. 599 (1970).

prior to beginning the same."[46] Whether or not this provision authorizes the Secretary of the Army to withhold a permit on purely ecological grounds where no obstruction to navigation would occur is, at present, a matter of considerable controversy. In the recent, possibly landmark case of *Zabel v. Tabb*,[47] a United States court of appeals held that "there is no doubt that the Secretary can refuse on *conservation grounds* to grant a permit under the Rivers and Harbors Act."[48] The court's ruling there was based essentially on national policy considerations aimed at preventing further inroads into the ecology of the local area.[49] Authority for the Secretary to deny the permit was founded on a House of Representatives Report,[50] the Fish and Wildlife Coordination Act,[51] the National Environmental Policy Act of 1969,[52] and ultimately, the commerce clause.[53] In reaching its decision, however, the court virtually ignored a major issue that is often present in cases involving the regulation of private land, namely, the question of a taking without compensation in violation of due process of law.[54] Thus, while *Zabel* may have been ecologically beneficial, other federal courts have rejected its reasoning, and have held that a permit could be validly denied only where navigation was in fact impeded.[55] A Congressional amendment to the Rivers and Harbors Act specifically authorizing the denial of a permit on conservation grounds would, at least, obviate the need for courts to make "public policy" decisions in such cases without substantial statutory or

46. Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 403 (1970).

47. 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971). This case has been noted in several recent articles. *See, e.g.* 19 KAN. L. REV. 539 (1971); 16 VILL. L. REV. 766 (1971).

48. 430 F.2d at 214 (emphasis added); *accord*, Citizens Comm. for the Hudson Valley v. Volpe, 302 F. Supp. 1083 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97 (2d Cir. 1970), *cert. denied*, 400 U.S. 949 (1971); *cf.* Environmental Defense Fund Inc. v. Corps of Eng'rs, 324 F. Supp. 878 (D.D.C. 1971).

49. Plaintiffs were thus denied a permit to dredge and fill in Florida's Boca Ciega Bay, which they requested to construct a trailer court.

50. OUR WATERS AND WETLANDS: HOW THE CORPS OF ENGINEERS CAN HELP PREVENT THEIR DESTRUCTION AND POLLUTION, H.R. REP. No. 917, 91st. Cong., 2d Sess. 6 (1970).

51. 16 U.S.C. §§ 661-66 (1970).

52. 42 U.S.C. §§ 4331-47 (1970).

53. U.S. CONST. art. I, § 8, cl. 3.

54. 430 F.2d at 215. The taking issue is discussed in Part IV, *infra*.

55. Coastal Petroleum Co. v. Secretary of Army, 315 F. Supp. 845 (S.D. Fla. 1970); Zabel v. Tabb, 296 F. Supp. 764 (M.D. Fla. 1969), *rev'd*, 430 F.2d 199 (5th Cir.), *cert. denied*, 401 U.S. 910 (1971). Interestingly, in *Coastal Petroleum*, the court found that it could not validly allow a permit to mine Lake Okeechobee to be simply denied to plaintiff. The district court faced the taking issue squarely, withheld the permit, but ordered compensation.

case law authority. Alternatively, sufficient authority could be provided by a favorable interpretation of this Act by the Supreme Court.

IV. Validity of the Coastal Zone Act

The validity of zoning legislation has traditionally been attacked as being violative of the due process clause of the United States Constitution,[56] and there is no reason to expect the CZA to escape being assaulted on this ground. In fact, this particular statute may have to face an additional onslaught from a different direction, namely, the commerce clause.[57] The CZA prohibits construction of off-shore bulk transfer facilities for oil, which naturally would be shipped from international sources.[58] Clearly, this would involve *some* interference with foreign and interstate commerce. Nevertheless, it seems unlikely that this will prove to be a critical problem. In dealing with the validity of local statutes regulating interstate commerce in the absence of conflicting congressional legislation, the Supreme Court has for some time employed a balancing test of state versus national interest.[59] In a recent articulation of this policy the Court has proclaimed that:

> [W]here the statute regulates evenhandedly to effectuate a *legitimate local public interest,* and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.[60]

The local benefit resulting from the prevention of oil and other pollution, in addition to beach preservation, seems fairly strong here. The evenhandedness of the legislation is shown by its application of the restrictions to all new industry, whether state residents or not. Further, even if the courts should indeed find

56. U.S. Const. amend. XIV, § 1.

57. *Id.* art. I, § 8, cl. 3.

58. CZA § 7001. The desirability of Delaware Bay for bulk transfer oil facilities is due to the fact that it is one of only two east coast naturally occurring deep water ports capable of handling the giant supertankers now increasingly being built. The only other such facility is in Maine.

59. This test was implied as early as Cooley v. Board of Wardens of Philadephia, 53 U.S. (12 How.) 299 (1851). The call for the employment of such an explicit balancing test by the Supreme Court in regard to state regulations affecting interstate commerce was urged in Dowling, *Interstate Commerce and State Power,* 27 Va. L. Rev. 1 (1940). The test was first fully stated in Southern Pac. R.R. v. Arizona, 325 U.S. 761 (1945).

60. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (emphasis added).

the burden on interstate commerce "excessive," in comparison to the benefits to Delaware, only a small portion of the Act would be invalidated by such a ruling. The remainder of the statute is expressly not to be affected, as provided in the Act's savings clause.[61]

The principal legal issue raised to date in cases dealing with restrictions on uses of coastal wetlands has been the well-known question of "taking" of private property without compensation in violation of due process, as opposed to the reasonable regulation of private property under the police power of the state.[62] This difficult issue has troubled the courts since the nineteenth century, and there is still no test for determining whether or not a *particular* limitation requires compensation or not.[63] As the Supreme Court has stated, "[t]raditionally, we have treated the issue . . . as being a question properly turning upon the *particular circumstances* of each case."[64] "There is no set formula to determine where regulation ends and taking begins. Although a *comparison of values* before and after is *relevant* . . . it is *by no means conclusive* . . . ."[65]

The best way to observe how modern courts have dealt with the present issue is to examine a few recent cases involving regulation of coastal zone property. As we shall see, the results

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61. CZA § 7014.

62. *See generally* Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L. J. 36 (1964); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. CALIF. L. REV. 1 (1970).

63. Some of our greatest jurists have spoken on the subject of "taking" versus police power. The elder Harlan said:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot . . . be deemed a taking . . . of property for the public benefit . . . . The power which the States have of prohibiting such use . . . is not—and . . . cannot be—burdened with the condition that the State must compensate . . . owners for pecuniary losses . . . by reason of their not being permitted . . . to inflict injury upon the community.

Mugler v. Kansas, 123 U.S. 623, 668-69 (1887). Mr. Justice Holmes said that: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Mr. Justice Brandeis in his dissenting opinion wrote: "Restriction upon use does not become inappropriate . . . merely because it deprives the owner of the only use to which the property can then be profitably put." *Id.* at 418.

64. United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (emphasis added).

65. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) (emphasis added). *See* Hadacheck v. Sebastian, 239 U.S. 394 (1915), upholding a reduction in value from $800,000 to $60,000.

are not unequivocal. Perhaps the best known case in this area is *Commissioner of Natural Resources v. S. Volpe, Inc.*[66] There, the Supreme Judicial Court of Massachusetts upheld a statute[67] requiring a permit from state and local officials before dredge and fill activities could be undertaken in wetlands areas. The court held that whether or not there was a taking of the defendant's property essentially depended on the value of the property to the defendant as a marsh compared to its value filled. This decision seems to imply that if a regulated marsh has no commercial value to its owner, he is free to fill it in and destroy it unless the state is willing to compensate him. The same Massachusetts court again upheld private property rights in *MacGibbon v. Board of Appeals.*[68] There, a local municipality's denial of a permit to excavate and fill shoreland was reversed. The court found that in order to preserve the area in its natural state, defendant was apparently not going to allow *any* improvements along the town shoreline.[69] Since such a regulatory conservation measure would be primarily one of public benefit, the Board had no authority to impose an individual burden on landowners by preventing them from obtaining any practical use out of their land, unless compensation were provided. In fact, the court expressly suggested that eminent domain would be appropriate here.[70]

A completely unequivocal decision in favor of property rights is found in *State v. Johnson.*[71] There, a dredge and fill permit was denied to applicants under authority of the Maine Wetlands Act.[72] The Supreme Judicial Court reversed. Finding that the issue was between "stopping the *insidious despoliation of our natural*

66. 349 Mass. 204, 206 N.E.2d 666 (1965). Plaintiffs sued to enjoin defendant from further filling a saltmarsh as part of a marina and housing project, and to compel removal of all landfill already completed. Defendant alleged that without the fill its property would virtually be of no use at all. The trial court had granted the injunction.

67. MASS. GEN. LAWS ANN. ch. 130, § 27A (Supp. 1971).

68. 356 Mass. 635, 255 N.E.2d 347 (1970). Plaintiffs applied for a permit to excavate and fill a portion of their shoreland. The Duxbury Board of Appeals denied the permit, and the trial court affirmed, holding that defendant did not exceed its authority.

69. *Id.* at 640, 255 N.E.2d at 351.

70. *Id.* at 641, 255 N.E.2d at 352. In addition to the property owners having no practical use for their land, they would, of course, still have its tax burden to pay.

71. — Me. —, 265 A.2d 711 (1970).

72. ME. REV. STAT. ANN. tit. 12, §§ 4701-09 (Supp. 1970). Here the trial court found plaintiffs' land would be valuable for housing if filled, but essentially worthlesss as a marsh. Nevertheless, it affirmed denial of the fill permit by the Wetlands Control Board of Maine.

resources,"[73] and the protection of private property rights, the court held that under the circumstances of the case, the regulation would be a taking. To leave these plaintiffs with worthless land would be "to charge them with more than their just share of the cost of [the] statewide conservation program, *granting fully its commendable purpose."*[74] The result here seems anomolous. The court balanced the public and private interests, found a very strong public interest, but still held for the property owner.

A considerably better result, at least in terms of ecological interests, is seen in *Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission.*[75] There, a denial of a permit to fill submerged land was upheld under a California statute designed to protect the Bay Area,[76] despite the fact that the property was apparently worthless for anything else. According to the court, the police power is inherent in the sovereign power of the state and cannot be restricted unless clearly arbitrary and unreasonable. It does not depend upon judicial precedent, nor is it based upon conditions of the *past,* '"which do not cover and control present day conditions . . . calling for revised regulations to promote the health, safety, morals, or general welfare of the public . . . .' "[77] Thus, under the circumstances of this case,

> it cannot be said that refusing to allow appellant to fill its bay land amounts to an *undue restriction* on its use. In view of the *necessity* for controlling the filling of the bay, *as expressed by the Legislature* . . . , it is clear that the restriction imposed does not go beyond proper regulation . . . .[78]

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73. — Me. at —, 265 A.2d at 716 (emphasis added).

74. *Id.* at —, 265 A.2d 716 (emphasis added); *accord,* Bartlett v. Zoning Comm'n of Old Lyme, 2 BNA ENVIR. RPTR. DECISIONS 1684 (1971); *cf.* Dooley v. Town Plan & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964); Morris County Land Improvement Co. v. Parsippany-Troy Hills Township, 40 N.J. 539, 193 A.2d 232 (1963).

75. 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (Dist. Ct. App. 1970). Plaintiff purchased submerged land in San Francisco Bay for forty thousand dollars specifically to deposit fill from a construction project. This parcel was adjacent to other filled or partially filled parcels.

76. McAlteer-Petris Act, CAL. GOV'T CODE § 66600 *et seq.* (West 1971). Under § 66604, the Bay Conservation and Development Commission has the power "to issue or deny permits, after public hearings, for any proposed project that involves placing fill in the Bay . . . ."

77. 11 Cal. App. 3d at 570-71, 89 Cal. Rptr. at 905.

78. *Id.* at 572, 89 Cal. Rptr. at 906; *cf.* Golden v. Board of Selectmen of Falmouth, — Mass. —, 265 N.E.2d 573 (1970), where the court upheld a denial of a permit to excavate a tidal marsh by local zoning authorities, despite its approval by appropriate state officials. In *Golden,* however, the taking without compensation issue was not discussed.

Thus the court found no taking. In *Candlestick,* the public and private interests were balanced, the public interests were found to be very substantial, and the regulation was sustained.[79]

It is quite apparent that the attitude of the Supreme Court of Delaware toward the taking issue will ultimately dictate the effectiveness of the Coastal Zone Act. That court might well tend to find applications of the CZA as takings requiring compensation to property owners, as did, for example, the Maine court in *Johnson.* If this in fact occurs, and Delaware is either forced to spend large amounts of money to condemn land by eminent domain, or allow polluting activities, then the Act could be rendered ineffective. Alternatively, if the court adopts the positive approach of the California court in *Candlestick,* then the CZA should go far towards preserving the Delaware Coastal Zone. Of course, actual effectiveness must, to a large extent, depend on the manner in which the Act is applied by state administrators. If the Act is not vigorously enforced we may see litigation primarily between permit applicants and conservation groups.[80]

There remains one final hurdle to be dealt with. Some of the cases discussed above have specifically involved constitutional issues. In none of them, however, even where a due process violation was found under the given circumstances, was a state coastal zone regulatory *statute* invalidated. Nevertheless, as we have seen, the CZA goes well beyond the other statutes. The most radical innovation of the Act is the *absolute ban* on "heavy industry" in the coastal zone. This was done because such industry, "although conceivably operable without polluting the environment, has the potential to pollute when equipment malfunctions or human error occurs."[81] Assuming a permit applicant who could show that *in fact* his heavy industry would not pollute beyond a de minimis level, this provision seems to be a vulnerable part of the CZA. The hypothetical plaintiff could argue that the statute is arbitrary and unreasonable—it violates the equal protection clause, since it discriminates against him as compared with other non-polluters, and it violates due process of law, since he is being penalized as a

79. It should be pointed out that the filling of San Francisco Bay represents a particularly pressing threat, and thus the public interest in regulation here may be unusually strong. *See* Note, *Saving San Francisco Bay: A Case Study in Environmental Legislation,* 23 STAN. L. REV. 349 (1971).

80. *But see, supra* notes 16-21 and accompanying text.

81. CZA § 7002 (e).

polluter when he is, in fact, not. Under such a fact situation, it is conceivable that a hostile court could invalidate the heavy industry proscription, and even the entire Act.[82] Of course, this is an unlikely result in general, and in the present era, very improbable. Given the above circumstances, a court is most likely to find the statute unreasonable only *as to the applicant* and order a permit issued to him. The basic statute itself should not be found unconstitutional, since it surely cannot be said that its provisions are "clearly arbitrary and unreasonable, having *no substantial relation* to the public health, safety, morals, or general welfare."[83]

V. Conclusion

The CZA is a landmark piece of legislation designed to protect the Delaware coast and beaches from future development in the interests of conservation. While it goes considerably further than previous legislation, the Act itself seems basically valid, although certain provisions of it could eventually be struck down. The ultimate effectiveness of the CZA probably will depend on whether or not the state courts tend to find regulation of private property under the statute "takings" requiring compensation, or merely valid exercises of the police power of the state.[84] The Act may well have been, at least in part, inspired by a holding of Delaware's Supreme Court denying regulation of a riparian owner's landfill on the ground that the *existing law* did not give the state *sufficient authority* to require its prior assent to such fill. The court there stated: "If the [legislature] wishes to control such development in the future by requiring prior permission, it must do so *by legislation duly enacted* . . . ."[85] The court's advice was certainly followed. As for the future, it is hoped that

82. *See* Carter v. Carter Coal Co., 298 U.S. 238, 312-16 (1936), where the labor provisions of the Bituminous Coal Conservation Act of 1935, ch. 824, § 15, 49 Stat. 991, 1007, were declared unconstitutional and used to invalidate the entire Act. This was done in spite of an express provision that if part of the legislation were declared void, the rest was not to be affected.

83. Village of Euclid v. Ambler Realty, 272 U.S. 365, 395 (1926) (emphasis added) (promulgating the standard for invalidation of a zoning act).

84. As seen in Part IV *supra*, the majority of state cases that have been litigated on this issue at the appellate level have found the respective regulations to be unconstitutional takings under the given circumstances. Nevertheless, growing awareness of the *necessity* for such regulations could ultimately change judicial attitudes as to the extent of the police power.

85. State *ex rel.* Buckson v. Pennsylvania R.R., — Del. —, 267 A.2d 455, 460 (1969).

> [t]he courts will, from now on, recognize that a legislative determination that [an] activity . . . needs to be regulated or prohibited is entitled to the greatest deference, and ought to be set aside only upon a clear showing that the activity . . . cannot be . . . detrimental to the ecology.[86]

The CZA is courageous legislation in a small state that is subject to the considerable influence of large chemical interests. As stated by Governor Peterson, passage of the Act

> could not have been achieved without enthusiastic public support . . . in the face of experienced lobbyists and concerted opposition from some quarters. I trust that our action can indeed serve as a forerunner for other states in . . . a continuous effort to maintain and protect our valuable resources.[87]

WILLIAM M. FEIGENBAUM

86. Garton, *Ecology and the Police Power*, 16 S.D.L. REV. 261, 289 (1971).
87. Letter from the Hon. R. W. Peterson, Governor of Delaware, to the author, September 7, 1971.